Supreme Court, U.S.
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No. 09-625

In The
Supreme Court of the United States

LFP PUBLISHING GROUP, LLC, DBA HUSTLER MAGAZINE,
Petitioner,

v.

MAUREEN TOFFOLONI, AS ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF NANCY E. BENOIT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Should the Court grant certiorari to review the United States Court of Appeals for the Eleventh Circuit's *en banc* denial of Appellant's Request for Rehearing and *En Banc* Review of the panel's opinion where there is no compelling reason to review the opinion, where there is no conflict of authority, where no undecided federal question exists, and where the thrust of Petitioner's argument is that the Eleventh Circuit misapplied settled law to the particular facts of this case?

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BRIEF OF RESPONDENT IN OPPOSITION

Maureen Toffoloni, as Administrator and Personal Representative of the Estate of Nancy E. Benoit, Plaintiff-Respondent, requests that the Court deny the Petition for a Writ of Certiorari seeking review of the decisions of the United States Court of Appeals for the Eleventh Circuit in this case.

INTRODUCTION/COUNTER STATEMENT

A concise summary of the background of this case was provided in the Eleventh Circuit Opinion below:

> Maureen Toffoloni is the mother and the Administer of the Estate of Nancy Benoit. Benoit and her son, both Georgia residents, were murdered by her husband, Christopher Benoit, in June, 2007. Christopher Benoit then committed suicide. Prior to her death, Benoit was a model and professional woman wrestler. Christopher Benoit was a well-known professional wrestler. Their deaths garnered a great deal of domestic and international media attention.
>
> Approximately twenty years before her death, Benoit posed nude for photographer Mark Samansky, who took both photographs and a video of her. Toffoloni alleges that, immediately after the shoot, her daughter asked Samansky to destroy the photographs and video and believed that Samansky had destroyed them. However, Samansky kept the video, from which he extracted nude and partially nude photographic stills of Benoit. Samansky

> conveyed the photographic stills to LFP, which published them in the March 2008 issue of *Hustler* magazine.

Toffoloni v. LFP Publishing, 572 F.3d 1201, 1204 (11th Cir. 2009).

In February 2008, Toffoloni filed suit against LFP (hereinafter "Hustler") in Georgia state court seeking damages for violation of Benoit's right of publicity. The case was removed to the United States District Court for the Northern District of Georgia, where the court granted Hustler's motion to dismiss for failure to state a claim. On appeal, the Eleventh Circuit reversed and also denied Hustler's request for rehearing and for *En Banc* review.

The Eleventh Circuit reviewed Georgia law and its common law right of publicity, which arises out of the constitutional rights to privacy. *Id.* In so doing, the Eleventh Circuit recognized that the rights of publicity and privacy protect against "the unwarranted publicity, ... or the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs *with which the public had no legitimate concern.*" *Id.* at 1204, 1206 (emphasis in original) (noting the tort "does not require the invasion of something secret, secluded or private pertaining to plaintiff, nor does it involve falsity It consists of the appropriation for the defendant's benefit, use or advantage of the plaintiff's name or likeness.... The interest protected ... is not so much a mental as a proprietary one, in the exclusive use of the plaintiff's name and likeness as an aspect of his identity").

Due to the nature of the right, however, the Eleventh Circuit also recognized that in certain circumstances, there is a conflict between the freedoms of speech and press guaranteed by the First Amendment and the right to privacy, guaranteed by the Due Process clause. In order to navigate between the competing, constitutionally protected rights of privacy and publicity and the rights of freedom of speech and press, therefore, Georgia adopted a "newsworthiness" exception to the right of publicity. Accordingly, the Eleventh Circuit noted that "[i]t is in the determination of newsworthiness – in deciding whether published or broadcast material is of legitimate public concern – that courts must struggle most directly to accommodate the conflicting interests of individual privacy and press freedom." *Id.* at 1208 (quoting *Shulman v. Group W Prods., Inc.*, 18 Cal 4th 200 (1998)). The court concluded that "courts are required to engage in a *fact-sensitive balancing*, with an eye toward that which is reasonable and that which resonates with our community morals, in order to protect the Constitution as a whole." *Id.* at 1207-1208 (emphasis added).

After balancing the facts alleged in Respondent's complaint, the court found that the complaint stated a viable claim under the Georgia common law tort of right of publicity. Specifically, the court held that because Hustler's focus was on the nude photographs of Nancy Benoit, which were wholly unrelated to a matter of legitimate public interest – her murder at the hands of her husband decades after the photographs were taken - they did not qualify for the newsworthiness exception to the right of publicity. *Id* at 1213.

Ultimately, this case is quite simple. *Hustler* Magazine, without authorization, and without compensation, published twenty-year-old nude photographs of Nancy Benoit and profited as a result. Under Georgia's right of publicity, Plaintiff is entitled to damages unless the published photographs were newsworthy. Determination of newsworthiness required the Eleventh Circuit to conduct a detailed "fact sensitive balancing" of the allegations in the complaint. Following that analysis, the panel concluded that the photos were not newsworthy. The law is settled in Georgia and across the country. In all privacy cases where the newsworthiness exception is at issue, courts necessarily must evaluate and analyze the facts and allegations to determine if the published material is "of legitimate public concern."

As discussed more fully below, because there is no conflict of authority, nor is there an undecided federal question at issue, the arguments raised by Hustler and by *amici curiae* fail to satisfy the criteria established by the Court for what makes a case worthy of review. Thus, the Petition should be denied.

ARGUMENTS FOR DENYING THE WRIT

I. None of the Criteria of Supreme Court Rule 10 Have Been Asserted in the Petition and None Apply.

Supreme Court Rule 10[1] provides practitioners with the only formal road map to the issues and factors that make a case worthy of consideration by the Court. It is remarkable, though understandable, that nowhere

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[1] Rule 10 Considerations Governing Review on Writ of Certiorari Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter, has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power,
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals,
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law

in its Petition does Hustler mention Rule 10 or even acknowledge the Rule's existence. The Rule is ignored by *amici curiae* as well.[2]

Understanding that the grant or denial of a petition for a writ of certiorari is within the discretion of the Court and recognizing that the considerations governing review as set forth in Rule 10 are "neither controlling nor fully measure the Court's discretion," the Rule provides that a petition "will be granted only for compelling reasons." Hustler has failed to identify any compelling reasons for granting its Petition and there simply are none.

As Justice Harlan stated fifty years ago while delivering the Benjamin N. Cardozo lecture to the New York City Bar Association, "a great many petitions for certiorari reflect a fundamental misconception as to the role of the Supreme Court." JUSTICE HARLAN, *Manning the Dikes*, 13 RECORD OF THE NYC BAR ASS'N. 541, 549 (1958) A review of Hustler's questions presented attests to the accuracy of Judge Harlan's

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[2] *Amicus curiae* First Amendment Lawyers Association ("FALA") timely requested consent to submit a brief in support of review. Because, at the time of the request, FALA was unable to identify other amici that might join the brief, consent was denied Thus, FALA included a motion for leave to file a brief in its brief *Amici curiae* The Reporters Committee for Freedom of the Press and The Society for Professional Journalists notified respondent of their intent to file a brief in support of the Petition just six days before the brief was due Because the request for consent was untimely, it was denied Nevertheless, a brief was filed but, contrary to Supreme Court Rule 37 2(b), the brief did not include a motion for leave to file the brief For that reason, and because the brief is redundant for the most part, it will only be considered here in passing

comment, as such review reveals that Hustler is simply displeased with the way the Eleventh Circuit decided the case. In petitioning for certiorari, however, a petitioner must do more than merely assert that the decision below was wrong. As confirmed by Rule 10, the United States Supreme Court is not a court of error – it does not intervene when a petitioner asserts error in a lower court's factual findings or the misapplication of a properly stated rule of law. Yet that is exactly what Hustler asserts in its Petition.

Rule 10 outlines three well-established grounds for granting certiorari: (1) cases raising a federal law question on which a conflict has developed among the federal circuits or state supreme courts; (2) cases in which the lower court reached a decision in conflict with governing Supreme Court precedent; and (3) cases squarely presenting an important issue of federal law with significant practical consequences. Hustler's Petition fails to satisfy any of these grounds, is utterly without merit, and should be denied. *See* WILLIAM J. BRENNAN, JR., *The National Court of Appeals: Another Dissent*, 40 U. Chi L. Rev. 473, 476-78 (1973) (Justice Brennan opines that about 90 percent of IFP and 60 percent of paid petitions are so "utterly without merit" as to require a "minimum amount of time and effort" to determine that denial is the proper disposition).

A. Notwithstanding Suggestions by Hustler and *Amici*, There Are No Conflicting United States Courts of Appeal Decisions Regarding the Questions Posed by Petitioner Nor Is the Eleventh Circuit's Opinion in Conflict with Any Decision of This Court.

From a surface review of Hustler's assertions it may appear that the Eleventh Circuit's opinion in this case is contrary to the precedents of other Circuits.[3] That is not the case, however. There are no conflicts between the decisions of other United States Courts of Appeals or state courts of last resort that require this Court to exercise its supervisory power. Chief Justice Rehnquist once wrote that for a case to be worthy of review by the Court, it should involve "*unsettled* questions of federal, constitutional or statutory law of general interest." CHIEF JUSTICE REHNQUIST, *The Supreme Court – How It Was, How It Is*, at 269 (1987) (emphasis added). Although Hustler and *amici* suggest otherwise, there are no unsettled questions presented here.

As will be seen, the Eleventh Circuit's opinion is directly in line with its sister Circuits. Specifically, the Second, Fifth, Seventh, and Tenth Circuits have similarly held that in order to properly balance

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[3] Hustler asserts in its heading on page 13 of its Petition that "[t]he Eleventh Circuit's opinion is contrary to the precedents of this Court and other Circuits declaring that under the First Amendment Right of Freedom of the Press, the 'newsworthiness' of nude photographs of a murdered public figure used to illustrate a magazine article of public interest on Decedent's life and death is to be determined by the publisher, not the courts."

freedom of the press against the right of privacy, every private fact disclosed in an otherwise truthful, newsworthy publication must have some substantial relevance to a matter of legitimate public interest. *Toffoloni v. LFP Publishing*, 572 F.3d 1201, 1212 (11th Cir. 2009) (quoting *Gilbert v. Med. Econ. Co.*, 665 F.2d 305, 308 (10th Cir. 1981)), *see also Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1996) (holding "[a]n individual, and more pertinently perhaps the community, is most offended by the publication of intimate personal facts when the community has no interest in them beyond the voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger"); *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85, 87-88 (2d Cir. 1989) (holding "it is appropriate for a court to consider whether the public interest aspect of the publication is merely incidental to its commercial value).

Hustler (and *amici*) separately and subtly assert that there is some pertinent split of authority among the Circuits or that the Eleventh Circuit opinion was somehow contrary to decisions of this Court. Hustler says that the opinion conflicts with "precedents of this Court and other Circuits" which permit the publisher – not the courts – to determine what is newsworthy.[4] *Amici* argue that different standards for determining newsworthiness have been announced by several circuits. The assertions are without merit.

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[4] Oddly, amici acknowledge the prerogative of *the courts, not the publisher*, to pass on the newsworthiness of published material

i) The Cases Cited by Hustler Do Not Cede the Determination of Newsworthiness to the Publisher.

Hustler argues that newsworthiness of published material "is to be determined by the publisher, not the courts." Petition at 13. Yet, no case decided by this or any other court supports that notion. No doubt, consideration of newsworthiness should be broadly construed and yes, courts should be cautious in their consideration of what is newsworthy. *See Lowe v Hearst Communications, Inc.*, 487 F.3d 246 (5th Cir. 2007) (test for determining newsworthiness is to be construed broadly, extending beyond the dissemination of news either in the sense of current events or commentary upon public affairs); *Harper & Rowe Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) (Courts should be chary of deciding what is and what is not news). Those admonitions aside, however, in *every* single privacy case involving the newsworthiness exception cited in support of the Petition, *courts* evaluated facts and *courts* determined whether the published material at issue was newsworthy. In no case did a court defer to the publisher.

The fact-sensitive balancing conducted by the Eleventh Circuit in determining whether Benoit's nude photos were newsworthy was no different than the nature of the analysis conducted by courts in the very cases cited by Hustler in support of its proposition that publishers are the final arbiters of newsworthiness. Although Hustler argues that the Eleventh Circuit "failed to cite any of the leading Supreme Court decisions in this area ... such as [*Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Regan v. Time, Inc.*, 468 U.S. 641

(1984); and *Harper & Rowe Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985)]", as revealed below, those cases offer no comfort to Hustler in the context of this argument. Petition at 19.

In *Time, Inc. v. Hill*, a "false light" privacy case, this Court considered whether Life Magazine was denied constitutional protections of speech and press when the New York courts awarded damages to a family on allegations that Life Magazine portrayed as accurate, a fictional account of the Hill family's ordeal while held hostage by escaped convicts. 385 U.S. 374 (1967). The Hill family sued Life Magazine on allegations that Life intended to, and did, give the impression that a Broadway play mirrored their experience – a fact which Life Magazine knew to be false. Life Magazine countered that the article was "'a subject of legitimate news interest,' 'a subject of general interest and of value and concern to the public' at the time of publication, and that it was 'published in good faith without any malice whatsoever....'" *Id.* at 379. The lower court ruled against Life Magazine because the article was not a mere dissemination of news but, rather, was intended to advertise and attract attention to the play and increase magazine circulation. *Id.* The New York Court of Appeals affirmed and upon grant of certiorari this Court reversed.

Although *Time, Inc. v. Hill* involved privacy rights juxtaposed with the First Amendment right of freedom of press, the focus of the case and this Court's holding was whether Life Magazine acted with knowing or

reckless falsity in publishing the article.[5] *Id.* at 390-391. Contrary to Hustler's representation, there was no holding in *Hill* that "newsworthiness" is to be determined by publishers and not by the courts. Rather, similar to the Eleventh Circuit, this Court in *Hill* engaged in a fact-sensitive review of the evidence in reaching its determination.

Similarly, in *Regan v. Time, Inc.* this Court considered whether a federal statute prohibiting a publisher from printing an illustration of U.S. currency in color rather than in black and white, or in dimensions approximating the size of genuine currency, violated the First Amendment protections of freedom of speech or press. 468 U.S. 641 (1984). A publisher brought a federal action challenging the constitutionality of 18 U.S.C. §§ 474 and 504. This Court determined that the purpose requirement of the statutes in question was discriminatory on the basis of content in violation of the First Amendment right of freedom of speech. *Id.* at 659. Unlike *Regan*, however, the case at bar did not arise out of a constitutional challenge to, or scrutiny of, Georgia's right of publicity law. Nor does the issue here arise out of the First Amendment freedom of speech. Rather, Hustler is asking this Court to determine whether the Eleventh Circuit erred in its review of the factual allegations and whether it misapplied Georgia law.[6] *Regan*

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[5] Of course, the question of truth or falsity is not pertinent to the case at bar

[6] As previously noted, Supreme Court Rule 10 expressly provides that assertion of error consisting of erroneous factual findings or the misapplication of a properly stated rule is not a proper basis for granting certiorari

provides no support for the proposition that the determination of newsworthiness is left to a publisher's discretion.

In *Harper & Rowe, Publishers, Inc. v. Nation Enterprises*, this Court considered to what extent the "fair use" provision of the Copyright Revision Act of 1976, 17 U.S.C. § 107, sanctioned the unauthorized use of quotations from a public figure's unpublished manuscript. 471 U.S. 539 (1985). A magazine that published verbatim quotes from President Ford's unpublished memoirs without his consent asserted that First Amendment values required the Court to excuse the unauthorized use of copyrighted material – a use that would ordinarily not pass muster as a fair use – because the pirated quotations constituted news in which the public would have interest. *Id.* at 555-556. In holding that the publication was not "fair use," this Court undertook a factual review of the case and focused on the purpose behind the magazine's unauthorized publication Of particular interest was the fact that the magazine's purpose hinged primarily on commercial interests and "had not merely the incidental effect but the *intended purpose* of supplanting the copyright holder's commercially valuable right of first publication." *Id.* at 562 (emphasis in original). Again, contrary to Hustler's representation, there was no determination by this Court that publishers retain the absolute right to determine what is newsworthy. Rather, the Court conducted a factual analysis and held that the doctrine of fair use should not be expanded to create what would have amounted to a public figure exception to this nation's copyright laws.

Moreover, in *Zacchini v. Scripps-Howard Broadcasting Co.*, the only case decided by this Court involving the right of publicity, the Court addressed the issue of whether the First and Fourteenth Amendments immunized a respondent from damages for its alleged infringement of a petitioner's state law "right of publicity." 433 U.S. 562, 568 (1977). This Court did not hold that publishers are the final arbiters of what is or is not newsworthy. In fact, the Court did not even focus on newsworthiness, but, rather, discussed how the right of publicity is violated when the disclosure of information serves to appropriate an individual's economic benefit without his consent. The Court held that, even though a state could, as a matter of law, privilege the press in such circumstances, the First and Fourteenth Amendments do not immunize such action.

Surely neither Hustler nor *amici* seriously contend that Hustler alone gets to decide whether the material it publishes is newsworthy. That simply is not what the cited cases say and that is not the law. There is no split among the Circuits on this issue and the fact balancing conducted by the Eleventh Circuit conforms with the many decisions of this Court. The various privacy rights of action share a common defense that if published material is newsworthy, it can be published. Determination of newsworthiness is, of necessity, dependent upon facts specific to the case. While there are calls here for a bright-line standard for determining when published material is newsworthy, this Court and numerous other courts have already announced guidelines, standards and criteria for making that determination. Because newsworthiness is fact dependent, a bright-line standard is neither

feasible nor is it desirable in the best interests of freedom of the press.

Moreover, an absolutist approach permitting publication of any matter, so long as it was true, has been squarely rejected by this Court. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *The Florida Star v. B.J.F.*, 491 U.S. 524, 532-33 (1989) ("Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily.... We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep not more broadly than the appropriate context of the instant case"); *Bartnicki v Vopper*, 532 U.S. 514 (2001) (The Court recognized "a conflict between interests of the highest order – on the one hand, the interest on the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy..." and the Court continued its refusal to address, in the abstract, whether publication of truthful information may ever be punished.)

The Court is evidently comfortable in narrowly balancing privacy interests of specific plaintiffs against what is viewed by the publisher as a matter of legitimate public concern. This balancing cannot occur under a theory that would permit the publisher to decide. Indeed, such a rule would cause privacy torts to be written out of the law at a time when personal privacy is under siege like no other time in history. Hustler's assertion that privacy protections be not based in rights bestowed by law, but rather on the

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taste and discretion of the press, is unsupported and unfounded.

ii) There Is No Split Among the Circuits Over How Newsworthiness Is Determined.

Notwithstanding clear agreement among the Circuits, Hustler argues that some Circuits disagree about how newsworthiness is determined, thus, requiring this Court's review. The cases upon which Hustler relies, however, do not demonstrate a split: *Lowe v. Hearst Communications, Inc* , 487 F.3d 246 (5th Cir. 2007); *Anderson v. Suiters*, 499 F.3d 1228 (10th Cir. 2007); *Ross v. Midwest Communications, Inc.*, 870 F.2d 271 (5th Cir. 1989); and *Alvarado v. KOB-TV, LLC*, 493 F.3d 1210 (10th Cir. 2007). If Hustler actually provided an analysis of the cases cited, rather than merely relying on "sound bites" and "snippets" from those cases, which are factually and legally distinguishable from the instant case and provide no support for granting the Petition, that fact would be obvious. Indeed, and as seen below, when the determination of newsworthiness is at issue, any perceived split of authority is illusory and the manner of determining the newsworthiness of published material is uniform. Just as the Eleventh Circuit utilized a fact sensitive balancing, so to do the other Circuits.

In *Lowe v. Hearst Communications*, a newspaper published an article describing a blackmail scheme carried out by two married attorneys 487 F.3d at 250-252. Subsequent to the article, the couple's bankruptcy estate filed a civil suit against the newspaper seeking damages for the public disclosure

of private facts. Similar to the case at bar, the Fifth Circuit acknowledged that state law controlled, with viability of the claim hinging on whether the publicized matter was "of legitimate public concern," entitling the publisher to newsworthiness protection.[7] *Id.* at 250 (citing *Cinel v. Cinnick*, 15 F.3d 1338, 1345-46 (5th Cir. 1994)). In order to reach its holding, the Fifth Circuit, like the Eleventh Circuit, analyzed the particular facts of the case. In so doing, it held that because the article described the use of the state's legal system – a system designed to protect the public – by prominent lawyers in a way that could be described as blackmail, the matter was of public concern and, thus, was considered newsworthy.

Similarly, in *Ross v. Midwest Communications, Inc.*, a rape victim brought suit alleging invasion of privacy against journalists for broadcasting a documentary that revealed details of her rape. The documentary was designed to help exonerate one rape suspect while casting suspicion on other suspects. 870 F.2d 271 (5th Cir. 1989). The journalists contended that the details of the rape were closely connected to an ongoing criminal investigation – a matter of legitimate public concern – and, thus, Texas and federal constitutional law prohibited the imposition of liability. *Id.* at 272. In addressing newsworthiness, the Fifth Circuit, like the Eleventh Circuit, necessarily undertook a fact-based review, holding that there was a logical nexus between the publication and a matter

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[7] "Of legitimate public concern" is the term, coined from Restatement (Second) of Torts § 652D, used to define newsworthiness – a term used uniformly throughout the country in privacy tort claims.

of legitimate public concern because the point of the publication, including details of the crime, was to persuade the public and authorities about a person's guilt or innocence. *Id.* at 274.

The *Ross* Court expressly noted that *it did not need to decide* the extent of judicial deference to editorial discretion, *nor did it need to decide* how much "'breathing room' is available to protect an editor, who publishes information that was potentially but not actually newsworthy, from retrospective judicial blue penciling." *Id.* at 275 (emphasis added). Rather, like the Eleventh Circuit, its holding was intended to be narrow, turning only upon the particular facts of the case. *Id.*

In *Anderson v. Suiters*, the Tenth Circuit balanced a rape victim's privacy rights against the media's First Amendment right of freedom of the press, ruling that *under the facts presented,* freedom of the press prevailed 499 F.3d 1228 (10th Cir. 2007). However, the court noted:

> Even where certain matters are clearly within the protected sphere of legitimate public interest, some private facts about an individual may lie outside that sphere .... [T]o properly balance freedom of the press against the right of privacy, every private fact disclosed in an otherwise truthful, newsworthy publication *must have some substantial relevance to a matter of legitimate public interest.*

Id. at 1236 (emphasis in original). That statement comports precisely with how the Eleventh Circuit balanced the competing issues below.

In *Anderson*, the plaintiff was raped by her estranged husband, a prominent local attorney, who secretly videotaped the incident. A copy of the videotape was released to the media and aired to the public. The rape victim sued the television station, its reporter, and a police officer who released the tape, alleging that displaying the videotape violated her constitutional privacy interests. The Tenth Circuit held that the release and broadcast of the videotape did not violate the victim's rights of privacy because the focus of the news broadcast was on the rapist and not on the victim. *Id.* at 1237. In reaching that conclusion, the Tenth Circuit, just like the Eleventh Circuit here, undertook a fact-intensive analysis to determine whether the videotape was substantially relevant to a matter of legitimate public interest.[8] The Tenth Circuit further acknowledged that a different result would have been required had the focus of the videotape been on the rape victim instead of on the rapist, because the privacy interests of the two could not be more different. *Id.* at 1237.

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[8] The videotape was displayed in connection with an ongoing investigation of a series of rapes allegedly perpetrated by the plaintiff's estranged husband, yielding a result similar to the Supreme Court of Georgia's decision in *Waters v. Fleetwood*, 212 Ga. 161, 91 S.E.2d 344 (1956). In *Waters*, plaintiffs' daughter was murdered and her brutalized and partially decomposed body was photographed shortly after being recovered from a river and was published in a local newspaper in connection with the timely, ongoing investigation of the murder. The court rejected plaintiffs' right of privacy claim finding that a publication concerning a matter of public interest or the subject matter of a public investigation does not violate one's right of privacy. A common thread connecting *Waters* to the cases relied upon by the court was that each involved the subject matter of a concurrent public investigation of a crime of great public interest.

In *Alvarado v. KOB-TV, LLC*, two undercover police officers brought invasion of privacy claims against a local television station for broadcasting their identities and undercover status in the context of their suspected involvement in an alleged incident of sexual assault. 493 F.3d 1210 (10th Cir. 2007). The United States District Court for the District of New Mexico dismissed the claims for failure to state a claim and, on appeal, the Tenth Circuit affirmed. In its analysis, the Tenth Circuit noted that the tort of publication of private facts "involves the publication of true but intimate or private facts about the plaintiff, such as matters concerning the plaintiff's sexual life or health." *Id* at 1218. The court concluded that to avoid dismissal, Plaintiffs must have been able to allege facts from which the court could conclude that the publication was not a matter of public interest *Id.* at 1219. Moreover, the court emphasized its endorsement of the position taken by the commentary in Restatement (Second) of Torts § 652D concerning what matters are of public interest:

> The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake with which a reasonable member of the public, with decent standards, would say that he had no concern

Id. at cmt. h. Again, like the Eleventh Circuit below, the Tenth Circuit in *Alvarado* conducted a review of pertinent facts, concluding that the broadcast was newsworthy as a matter of public interest because the case involved allegations of police misconduct and, therefore, involved a public service position.

Respondent does not dispute that the above-referenced cases resulted in findings that, under the facts presented, the published matter at issue was newsworthy, entitling the publisher in each case to First Amendment protection. The factual analyses in those cases, however, are not determinative of whether this Petition should be granted. Hustler asserts that certiorari should be granted because the Eleventh Circuit, contrary to decisions of other Circuits, erred by conducting a factual determination of newsworthiness. Contrary to that assertion, however, and as the cases above demonstrate, the Circuits, including the Eleventh Circuit, are aligned: to properly balance freedom of the press against the right of privacy, courts must undergo an analysis of the private facts disclosed to determine whether the publication of those facts is a matter of legitimate public interest and, thus, newsworthy. Accordingly, there is no disagreement requiring this Court's review and Hustler's Petition should be denied

iii) The Court Ordinarily Will Not Grant a Petition to Correct Errors of Fact or a Misapplication of the Law.

The final sentence of Rule 10, as amended in 1995, provides that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Hustler does not dispute the Eleventh Circuit's rather detailed discussion of Georgia's right of publicity law and its newsworthiness exception. Indeed, Hustler agrees that the rule of law was correctly stated below and appears to be well settled. Petition at 12 (stating "[t]hus, the Eleventh Circuit correctly recognized – at least in principle – the

'newsworthiness' exception to the Georgia right of publicity"). Notwithstanding this admission, Hustler disagrees with the way in which the Eleventh Circuit applied that law to the facts alleged in the complaint: "[t]he Eleventh Circuit Misinterpreted the Constitutional Standard for Newsworthiness." Petition, Argument II b, at 17-28. Such a merits-like argument is precisely the type of argument discouraged by the final sentence of Rule 10. As stated in *United States v. Johnston*:

> The Supreme Court will usually deny certiorari when review is sought of a lower court decision that turns solely upon an analysis of the particular facts involved, or upon construction of particular contracts or written instruments. 'We do not grant a certiorari to review evidence and discuss specific facts.'

Supreme Court Practice § 4.14 at p. 270 (9th Ed. 2007) (quoting *United States v. Johnston*, 268 U.S. 220, 227 (1925)).

As discussed earlier, Hustler identifies no splits of authority, nor is this a case that involves a matter of obvious national importance and no statutes are implicated in the opinion below. Rather, Hustler wants the Court to grant certiorari simply because it is displeased with the way the Eleventh Circuit applied well-settled principles of Georgia common law to the facts alleged in the complaint. There seems to be little dispute that this Court will generally avoid cases like this one, especially when the primary issue relates to the interpretation or application of *state* law. *Leavitt v. Jane L.*, 518 U.S. 137, 144-145 (1996) ("We do not normally grant petitions for certiorari solely to

review what purports to be an application of state law").[9]

II. The Eleventh Circuit Correctly Applied Georgia Tort Law to the Particular Facts Alleged in the Complaint.

A. Georgia Law Recognizes Where Published Matters Are Utilized for Commercial Purposes Without Consent or Compensation to the Owner, a Right of Action Exists Unless the Newsworthiness Exception Applies.

The verified complaint filed by Respondent asserts a single claim for Hustler's violation of Plaintiff's right of publicity under Georgia law. The Eleventh Circuit below described the Georgia tort thusly:

> [A] right to control if, when, and under what circumstances one's image is made public and subject to scrutiny.

572 F.3d at 1206. The right of publicity was first recognized in Georgia in *Cabaniss v. Hipsley*, 114 Ga. App. 367, 151 S.E.2d 496 (1966) where the plaintiff sued the Atlanta Playboy Club for using her photograph without authorization or compensation in an advertisement. While arising out of the right of privacy, Georgia recognizes a distinction between the

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[9] In *Leavitt*, the Court made an exception where the alternative to granting certiorari would amount to "allowing blatant federal court nullification of state law." *Id.* Hustler does not argue that the Eleventh Circuit nullified Georgia law with respect to the right of publicity or the newsworthiness exception.

right of publicity and the other privacy torts. The court held that the right of publicity "consists of the appropriation of the plaintiff's name or likeness .... The interest protected .. is not so much a mental as proprietary one, in the exclusive use of the plaintiff's name and likeness as an aspect of his identity." 151 S.E.2d at 503-504.

In *Martin Luther King, Jr. Ctr. for Soc Change, Inc. v. Am. Heritage Prods , Inc.*, the Georgia Supreme Court clarified that, under Georgia law, the right of publicity recognizes:

> [t]he rights of private citizens, as well as entertainers, not to have their names and photographs used for the financial gain of the user without their consent, where such use is not authorized as an exercise of freedom of the press.

250 Ga. 135, 296 S.E. 2d 697, 703 (1982). In *Martin Luther King*, defendants marketed busts of Dr. King, accompanied by a free biographical booklet detailing his life. In its discussion of the case, the Eleventh Circuit acknowledged that although the opinion did not expressly deal with the "newsworthiness" exception, the Georgia Supreme Court found the booklet to be irrelevant because it was incidental to the busts themselves. *Toffoloni*, 572 F 3d at 1210. In so doing, the *Martin Luther King* court ultimately held that:

> [W]e hold that the appropriation of another's name and likeness, whether such likeness be a photograph or sculpture, without consent and

> for the financial gain of the appropriator is a tort in Georgia ....

Martin Luther King, 296 S.E.2d at 703. Accordingly, Georgia recognizes that where such published matters are utilized for commercial purposes without authorization or compensation to the owner, a right of action exists unless that right is trumped by the "newsworthiness exception "

Mimicking the *King* defendants' argument in its briefing below and in its Petition here, Hustler posits it is spared from liability for its exploitative publication of Ms. Benoit's photos in its pornographic magazine because the photos are newsworthy. Specifically, Hustler asserts the photographs were newsworthy because they were illustrative of a biographical article which was included in the publication. The Eleventh Circuit disagreed. Following the precedent of the Second Circuit and the reasoning of Georgia's Supreme Court, the Eleventh Circuit considered whether the public interest aspect of the publication – the article – was merely incidental to its commercial purpose – the publication of the unrelated and exploitative nude photographs. *Id.* at 1209 (citing *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85, 87-88 (2d Cir. 1989) (stating "it is appropriate for a court to consider whether the public interest aspect of the publication is merely incident to its commercial purpose")). As discussed more fully below, the Eleventh Circuit held that the publication itself unequivocally demonstrated that the article was indeed incidental to the commercial purpose of the publication.

Moreover, applying the *Martin Luther King* court's reasoning to the specific facts of this case, the Eleventh Circuit stated:

> We are convinced that the Supreme Court of Georgia would find similarly here. LFP's brief biography of Benoit's life, even with its reference to her youthful pursuit of modeling, is merely incidental to its publication of her nude photographs. Therefore, the biographical piece cannot suffice to render the nude photographs newsworthy.

572 F.3d at 1210 The court also rejected Hustler's argument that "someone's notorious death constitutes a carte blanche for the publication of any and all images of that person during his or her life, regardless of whether those images were intentionally kept private and regardless of whether those images are of any relation to the incident currently of public concern." *Id.*

B. The Eleventh Circuit Correctly Performed a Factual Analysis in Determining, Under the Facts Alleged, That Hustler's Publication of Decades-Old Nude Photographs of Nancy Benoit Was Not a Matter of Legitimate Public Concern.

That Georgia courts recognize the newsworthiness exception as a defense to a right of privacy claim is beyond cavil. *See Waters*, *supra*, at 161 In its decision, the Eleventh Circuit, in line with the precedents of its sister Circuits and of this Court, recognized that the competing interests between freedom of the press and the right of privacy require a

fact-sensitive balancing in order to determine whether Hustler's publication of the Benoit photographs constituted a matter of legitimate public concern. *Toffoloni*, 572 F.3d at 1208 (stating "courts are required to engage in a *fact-sensitive balancing*, with an eye toward that which is reasonable and that which resonates with our community morals, in order to protect the Constitution as a whole") (emphasis added). In doing precisely that, the Eleventh Circuit correctly concluded that the newsworthiness exception does not apply here and does not provide Hustler with the First Amendment protection it seeks.

Specifically, the Court undertook a careful and balanced review of the pertinent portions of Petitioner's March, 2008 edition of *Hustler* Magazine, including: the cover (**"WRESTLER CHRIS BENOIT'S MURDERED WIFE NUDE"**); the index (**"NANCY BENOIT Exclusive Nude Pics of the Wrestler's Doomed Wife"**) and the first of a two-page spread featuring ten fully or partially nude photos of Ms. Benoit (**"Exclusive Pics! Exclusive Pics! Exclusive Pics! NANCY BENOIT AU NATUREL – The Long-Lost Images of Wrestler Chris Benoit's Doomed Wife"**). *See Appendix A*, which is excerpted from the cover, index, and photo spread contained in the March, 2008 edition of *Hustler* Magazine.

After its careful review, the Eleventh Circuit ruled that the newsworthiness exception did not apply holding that under the circumstances, there was no connection between a newsworthy event and the nude pictorial, extracted from a videotape taken twenty years before. Indeed, Hustler's focus was not on the murder of Nancy Benoit, nor was it focused on the

murderer, Chris Benoit, or the investigation of the crime. Rather, Hustler's focus was exclusively on "long-lost" nude pictures of Ms. Benoit,[10] which had no substantial relevance to a matter of legitimate public interest – the murder itself.

Even if Ms. Benoit once, in her early twenties, aspired to a nude modeling career, such an alleged aspiration never developed into an incident of public concern.[11] As correctly observed by the Eleventh Circuit, this was particularly the case because Ms. Benoit "sought the destruction of all of those images" immediately after they were taken. *See Toffoloni*, 572 F.3d at 1211. Accordingly, Hustler's publication of the nude photographs, without Ms. Benoit's consent, never provided "information to which the public was entitled." *See* RESTATEMENT (SECOND) OF TORTS §652D, at cmt. h. Rather, Hustler's publication clearly constituted a "morbid and sensational prying into [the private life of Ms. Benoit] for its own sake, with which a reasonable member of the public, *with decent standards*, would say that he had no concerns." *Id.* (emphasis added). Such is exactly the type of information which an individual is entitled to keep private. *Id.* (noting "even public figures .. may be 'entitled' to keep private 'some intimate details .. such

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[10] Hustler admits the allegations contained in the verified complaint that it is a pornographic magazine and that the majority of its content "is graphic and sexual photographs of nude women." Complaint ¶7. In keeping with this theme, the cover, index and caption of the photo spread focused exclusively upon the nude photos themselves. The photos were not connected with any matter of legitimate public interest.

[11] Of note, Ms. Benoit never pursued a nude modeling career.

as sexual relations....' 'The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern'").

Additionally, while certainly not dispositive, the Eleventh Circuit also found support for its decision in *Douglass v. Hustler Magazine, Inc.*, 769 F 2d 1128 (7th Cir. 1985), which involved claims of false light and right of publicity related to Hustler's publication of nude photos of Ms. Douglass without her consent and without compensation. The photos had been taken for a photo shoot for *Playboy* Magazine but the photographer, after becoming employed by Hustler several years after the photos were taken, permitted Hustler to publish them. With respect to the right of publicity, the Court concluded that Illinois (like Georgia) recognizes such a claim and also (like Georgia) acknowledges the newsworthiness exception as a potential defense. Relying on *Zacchini*, *supra*, the Court concluded that "Hustler can run a story on [Ms. Douglass] and use any photographs that are in the public domain...but it cannot use photographs made by others for commercial purposes and ... withheld from public distribution." 769 F.2d at 1138. The Court stated that "forced to guess, we guess that Illinois would recognize a "right of publicity" on the facts of *Zacchini* and the analogous facts of the present case." 769 F.2d at 1139.

In the present case, Hustler acknowledged in the "article" accompanying Ms Benoit's nude pictorial that "[w]hile the original print negatives were destroyed at Nancy's behest, the video from which these images

were taken survived." Those photos were never before published and were certainly not in the public domain. As the Eleventh Circuit correctly concluded following its fact-sensitive balancing, the fact that Hustler published the un-newsworthy photographs and profited as a result is sufficient, under Georgia law, to state a claim upon which relief can be granted. Reversal was appropriate.

CONCLUSION

Because the Petition fails to identify any criteria justifying review by this Court and because the case was decided correctly below, Respondent requests the Petition for a writ of certiorari be denied.

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APPENDIX

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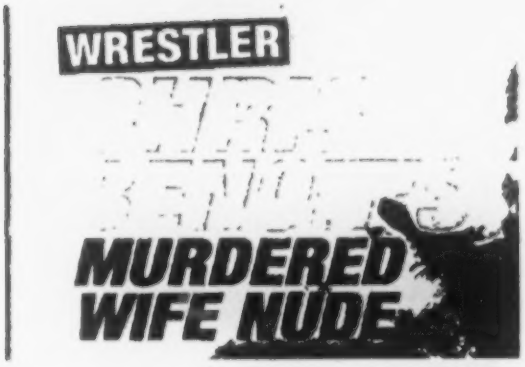
Appendix A: Excerpt from March, 2008 edition of *Hustler* Magazine (the cover, index, and photo spread) 1b

APPENDIX A

Cover



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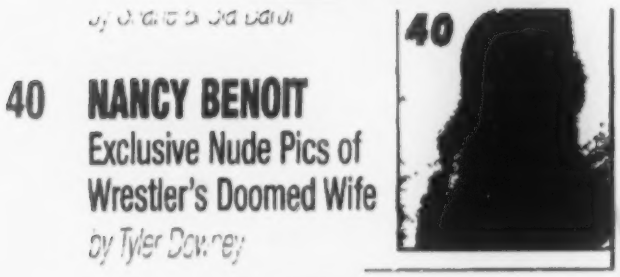

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